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No. 75-1050

In the Supreme Court of the United States

OCTOBER TERM, 1975

COMMONWEALTH OF VIRGINIA EX REL. STATE AIR POLLUTION CONTROL BOARD, PETITIONER

v.

RUSSELL E. TRAIN, ADMINISTRATOR, AND ENVIRONMENTAL PROTECTION AGENCY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE RESPONDENTS

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MEMORANDUM FOR THE RESPONDENTS

Petitioner seeks review of a decision affirming in part and vacating in part certain regulations of the Administrator of the Environmental Protection Agency (EPA) to be incorporated in a transportation control plan to improve and maintain the air quality in the National Capital area. On January 26, 1976, the government also petitioned for a writ of certiorari in the instant case (*Train* v. *District of Columbia*, No. 75-1055). In that petition, and our related petitions (*Environmental Protection Agency* v. *Brown*, No. 75-909, and *Environmental Protection Agency* v. *State of Maryland*, No. 75-960)[1], we have asked this Court to consider two questions:

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[1]We served copies of all three petitions on petitioner when we filed our petition in No. 75-1055.

1. Whether, upon a State's failure to adopt an implementation plan meeting the requirements of the Clean Air Act, the EPA Administrator has authority under the Act to require the State to inspect motor vehicles to assure that they are properly maintained to control airborne pollutants within the State.

2. Whether, if the EPA Administrator has such statutory authority, the Clean Air Act is in this respect a valid exercise of Congress' power under the Commerce Clause of the Constitution.

Petitioner contends that the Administrator has no statutory authority to require the State to refuse to register vehicles that do not conform to federal requirements; that he has no statutory or constitutional authority to require the State to establish exclusive bus lanes and to contribute to the purchase of more buses; and that petitioner is not the owner or operator of the affected bus fleet (Pet. 2-3). We submit that the first contention is fairly comprehended within the first question raised in our petitions, the second is so closely related to the questions we have raised that it merits review together with them, and the third does not warrant review by this Court.

The statutory scheme, the challenged regulations, and the decision below are summarized in our petition for a writ of certiorari in *Train* v. *District of Columbia,* No. 75-1055. As we there pointed out, the Clean Air Act, 81 Stat. 485, as amended, 42 U.S.C. 1857 *et seq.,* requires the Administrator to promulgate standards for maximum concentrations of particular pollutants in the air (Section 109). The States must then develop plans to achieve and maintain these standards within each air quality control region in the State (Section 110(a)(1)). The Administrator reviews these state implementation plans for conformity to the statutory requirements designed to assure that they provide for effective enforcement of the concentration standards (Section 110(a)(2)). If the Administrator finds an implementation plan inadequate, he

must promulgate an appropriate plan for the State (Section 110(c)). When the Administrator finds "any person"[2] in violation of any implementation plan, Section 113 of the Act authorizes him to undertake enforcement measures, including application to an appropriate district court for a temporary or permanent injunction.

The Administrator disapproved in part the implementation plans submitted by Virginia, Maryland and the District of Columbia, and accordingly, on November 15 and December 6, 1973, promulgated certain additional regulations to be incorporated in the plans. These regulations, based largely on proposals by the jurisdictions affected, were designed to ensure that each jurisdiction would establish a program for the inspection and maintenance of certain motor vehicles in the National Capital area, establish exclusive bus lanes in certain designated highway corridors[3] and increase bus service in the area by, *inter alia,* contributing to the purchase of more buses. Each jurisdiction was required to submit detailed compliance schedules showing the steps it would take to establish and enforce the required programs, including identification of the sources and amounts of funding anticipated (Pet. App. 299-327). Virginia, Maryland and the District of Columbia did not submit the required schedules; instead, they petitioned the court of appeals for review of the Administrator's action pursuant to Section 307(b)(1) of the Clean Air Act, as amended, 84 Stat. 1708, 42 U.S.C. 1857h-5(b)(1).[4]

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[2]"Person" is defined in Section 302(e) to include a "State, municipality, and political subdivision of a State."

[3]A highway corridor may include a number of highways providing alternative routes between given points.

[4]Since the implementation plans involved the District of Columbia, the United States Court of Appeals for the District of Columbia Circuit was the appropriate circuit court to review the Administrator's action in promulgating the plans. 42 U.S.C. 1857h-5(b)(1); Pet. App. 276, n. 6.

The court held that the Clean Air Act did not authorize the Administrator to require the States to adopt legislation or regulations to establish a transportation control program found necessary by the EPA. Thus, if a State fails to submit an acceptable plan, the Administrator must promulgate the regulations to be applied within the State; he cannot compel the State to do so. But the court also indicated that when such regulations have been promulgated, the Act may be read as authorizing the Administrator to require the States to enforce them (Pet. App. 282-287). The court then considered the constitutionality of the Act as so interpreted, and concluded that a State could be required to enforce federal regulations designed to control pollution the State caused directly (*e.g.*, through operation of state-owned vehicles) or indirectly (*e.g.*, through permitting use of its roads by vehicles not conforming to federal requirements). It concluded that the provisions relating to exclusive bus lanes and increased bus service reflected proper federal regulation of indirect pollution sources controlled by the States. But it also decided that although the federal power extended to requiring the States to prohibit the use of state roads by vehicles that do not comply with federal standards, it could not constitutionally extend to requiring the State to inspect privately operated vehicles to assure that they comply with those standards (Pet. App. 287-294).

The court below thus upheld the exclusive bus lane and increased bus fleet regulations, but remanded the auto inspection, maintenance, and retrofit regulations to the Administrator with directions to promulgate complete and enforceable regulations to cure the deficiencies in the state plans (Pet. App. 298-299).

1. Petitioner asks, as do we, that this Court review the question whether the Administrator has authority to require the States to enforce federally established limitations

on motor vehicle emissions through inspection and maintenance programs. We do not, however, agree with petitioner's formulation of the issue as being whether state registration laws are pre-empted by the Clean Air Act; there is no suggestion that the emission standards replace any part of the state registration laws, or render them inoperative in any way. Instead, they are simply an added requirement to be enforced by the State. Cf. *City of Burbank* v. *Lockheed Air Terminal*, 411 U.S. 624; *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 230.[5] With this reservation, we believe the first question raised by petitioner involves substantially the same issues as the first question in our petitions for certiorari in this case and in *Brown* and *Maryland*, and, for the reasons noted in our petitions, that those issues merit review by this Court.

2. Petitioner also contends that the Administrator lacks the statutory and constitutional power to require the State to establish exclusive bus lanes and contribute to the purchase of additional buses.[6] This contention is

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[5]The petition also assumes that the emissions standards are to be implemented by a "federal emission inspection" (Pet. 3, 6). The challenged transportation plan contemplates State, rather than federal, inspection systems, a choice the court of appeals here found to be unconstitutional. Our petition in this case seeks review of that judicial determination.

[6]Petitioner's objection to the bus fleet increase regulations is based primarily on the contention that sole responsibility for the purchase of the buses in the National Capital Metropolitan Area is vested in the Washington Metropolitan Area Transit Authority (WMATA), not the petitioner. But petitioner participates in WMATA through the Northern Virginia Transportation District, which is authorized under state law to make commitments for the acquisition of transit facilities and equipment. The local communities served also contribute to WMATA (Pet. 12). The Administrator's regulations accurately reflect these financial arrangements by requiring commitments for the acquisition of buses to be made either by "the Commonwealth of Virginia or by

closely related to the statutory and constitutional issues concerning the automobile inspection and maintenance regulations raised in our petitions in this case and in *Brown* and *Maryland*: the underlying question of the extent of the Administrator's authority to require state actions to implement the Clean Air Act is the same. Moreover, the court in *Brown, supra,* found the similar bus lane regulations there involved to be unauthorized by the Clean Air Act. Accordingly, the Court may wish to consider this issue together with the issues raised in our petitions.

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its local governments" (Pet. App. 318). Moreover, petitioner's current disavowal of any responsibility for bus purchases is inconsistent with its position in its own proposed transportation plan. See 38 Fed. Reg. 20792 (1973); Record, p. 5003.

Petitioner also objects to the cost of requiring it to implement both the bus lane and the fleet increase regulations. Regardless whether the cost to a State of complying with federal standards is a proper basis for invalidating a federal regulation, but see, *e.g., Employees* v. *Missouri Public Health Department*, 411 U.S. 279, 284; *Oklahoma* v. *Guy F. Atkinson Co.*, 313 U.S. 508, 527, petitioner over-estimates the cost to the State of these regulations. The bus lane regulations contemplate the designation of existing highway lanes for the use of buses during peak hours, rather than additional highway construction. The expenses of the additional buses will be substantially funded—up to 80 percent—by the federal government through grants under the Urban Mass Transportation Act of 1964, 78 Stat. 302, as amended, 49 U.S.C. 1601 *et seq.* See E.P.A. Hearings on National Capital Area Plan, C.A. App. 252, 269, 501-503; 49 U.S.C. (Supp. IV) 1603.

Finally, petitioner suggests (Pet. 12) that it is inappropriate to require Virginia to establish bus lanes on the George Washington Parkway, which is maintained and regulated by the federal government. But that requirement is based directly on petitioner's own suggested implementation plan, which proposed bus lanes for the George Washington Parkway corridor, and advised the EPA that special memoranda of understanding with the National Park Service were unnecessary because of the Service's close working relationships with the state and local authorities (see Record, pp. 5000-5002).

3. Petitioner raises as an issue, but does not separately argue, the question of the ownership and responsibility for operation of the bus fleet within the National Capital area. This question was not raised or considered below, and accordingly this Court should not consider it. *Lawn* v. *United States*, 355 U.S. 339, 362-363, n. 16; *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147, n. 2. In any event, it does not warrant review by this Court. Petitioner admits its ownership of and responsibility for the use of state highways; the requirement to contribute to the purchase of more buses is directed at altering the use of those highways in order to minimize air pollution. In that context, the precise means Virginia has utilized to provide bus service to its inhabitants is irrelevant. It is enough that, as noted above, the state and local governments participate in the agency through which the service is provided. The details of that participation do not affect the important statutory or constitutional questions at issue here, and are, in any event, peculiar to the National Capital area since they depend on the nature of the compact creating the WMATA. This Court thus need not consider them.

Accordingly, the Administrator does not oppose the petition, but suggests that if the petition is granted, the grant should be limited to questions 1 and 2, which involve petitioner's statutory and constitutional claims.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

ROBERT V. ZENER,
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